No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Commerce Clause permits a State to levy a user fee only on interstate commerce, where both interstate and intrastate commerce impose similar costs upon the State and where the State could impose a nondiscriminatory user fee on both interstate and intrastate commerce.

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. ("ATA"), is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. That industry consists of every type of motor carrier operation throughout the United States and includes tens of thousands of interstate

for-hire carriers, private carriers, and leasing companies.

The interstate trucking industry has been a frequent target of discriminatory state taxes and user fees. ATA and its members have therefore brought or participated in Commerce Clause challenges to a wide range of state taxes and fees before this Court and other state and federal courts. *See, e.g., Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992); *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *American Trucking Associations, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *Commonwealth of Kentucky, Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). In some of these cases, States have defended their discriminatory levies on a theory quite similar to the one adopted by the Oregon Supreme Court in this case—that a state user fee may discriminate against interstate commerce as long as the fee is cost-justified. *See American Trucking Associations, Inc.* v. *Secretary of Administration, supra; American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct.) (pending). ATA therefore has a strong interest in the issue presented in the certiorari petition.[1]

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.2.

ARGUMENT

THE OREGON SUPREME COURT'S DECISION ADDRESSES A LEGAL QUESTION OF GREAT PRACTICAL IMPORTANCE THAT SHOULD BE CONSIDERED BY THIS COURT

The Oregon Supreme Court upheld the facially discriminatory user fee at issue in this case on the ground that it was "a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste" and that such fees "violate[] the Commerce Clause only where the amount of the fee is 'manifestly disproportionate to the services rendered.'" Pet. App. 18a (citations omitted). According to the Oregon Supreme Court, therefore, a State may explicitly single out interstate commerce for a significant financial burden without requiring intrastate commerce to compensate the State for the very same costs.

As the petition demonstrates (Pet. 12-20) and we discuss below (at pages 8-10), this holding sharply conflicts with this Court's decisions regarding the Commerce Clause standard applicable to user fees. Interstate commerce may be required to pay its fair share of a State's costs as long as intrastate commerce is subjected to the same obligation. But a State may not impose a substantial financial burden solely on interstate commerce unless it can "'justify [that discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014 (1992) (citation omitted).

Even more critical for present purposes is the fact that the Oregon court's holding squarely conflicts with

other lower court rulings regarding the Commerce Clause standard applicable to user fees and will spawn considerable confusion regarding the States' power to discriminate against interstate commerce in imposing these frequently-used levies in all areas of state regulation. This Court should grant the petition for a writ of certiorari in order to prevent these adverse consequences.

A. The Question Whether The Commerce Clause Permits A State To Levy User Fees Expressly Limited To Interstate Commerce Has Tremendous Practical Significance.

States impose user fees in a variety of circumstances: to recover the costs of inspection and licensing programs, to generate funds for maintaining state-supported facilities used by businesses, and to compensate the State for other direct costs resulting from commercial ventures. Indeed, in this time of fiscal constraint, States appear to be turning to user fees more often in order to obtain funds needed to finance governmental activities.

The trucking industry, for example, must shoulder a variety of different fees exacted for the ostensible purpose of recovering various costs borne by the States in regulating highway transportation and maintaining and expanding our nation's roadways. Fees that the States have sought to impose include vehicle registration fees, fees for the many different licenses that a vehicle must obtain (for example, fuel use licenses and licenses for transporting specific types of substances), insurance registration fees, hazardous material transportation fees, fuel consumption taxes, mileage taxes, and weight-distance taxes.

With some frequency, these fees are drawn so as to impose a discriminatory financial burden on interstate trucking. That is the inevitable result of a political structure in which the state representatives enacting the levies seek to minimize the financial burden on their own constituents. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940); R. Posner, *Economic Analysis of Law* § 26.3, at 602 (3d ed. 1986) ("[e]ach state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states"); L. Tribe, *American Constitutional Law* § 6-5, at 409 (2d ed. 1988) ("state and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents") (emphasis in original).

This Court, and a number of lower courts as well, have been vigilant in striking down even facially neutral fees and taxes found to discriminate against interstate commerce by shifting a disproportionate amount of the cost burden away from intrastate trucking and on to interstate trucking. *See, e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *American Trucking Associations, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Associations, Inc.* v. *Gray*, 746

S.W.2d 377 (Ark. 1988), rev'd in part on other grounds, 496 U.S. 167 (1990); *American Trucking Associations, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988); *Commonwealth of Kentucky, Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988).

Under the legal standard adopted by the Oregon Supreme Court, however, the discriminatory character of these fees apparently would be legally irrelevant. As long as a fee could be justified on the basis of the State's costs, it would pass muster under the Commerce Clause despite the presence of clear discrimination against interstate commerce (here, for example, intrastate commerce is entirely exempted from the burden imposed on interstate commerce even though the costs Oregon seeks to recover are common to disposal of all waste).

Such a revolutionary change in Commerce Clause doctrine would make it very difficult for the interstate trucking industry to protect itself against discriminatory state levies. Indeed, the very argument accepted by the Oregon court has been advanced—and rejected—in several cases challenging discriminatory highway fees and taxes.

American Trucking Associations, Inc. v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), for example, was a challenge to facially neutral license fees imposed by the Commonwealth of Massachusetts. Funds generated by these fees were reserved for purposes of funding related state activities (*see id.* at 98-99). The Commonwealth attempted to justify its $200 per truck hazardous waste transporter fee by asserting that the fee was based on the annual cost of the transporter enforcement program (*id.* at

102). The state supreme court rejected that argument, stating that even if the fee were justified by reference to the Commonwealth's costs, the fee was invalid under the Commerce Clause because the manner in which those costs were allocated among transporters discriminated against interstate commerce (*ibid.*). The court further rejected the Commonwealth's assertion that the user fees should be measured against a Commerce Clause discrimination standard different from the one applicable to taxes. *Id.* at 99 n.9, 102.[2]

A similar argument was made in *American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct.), a challenge to New Hampshire's hazardous waste transporter fees.[3] The State argued there that "[b]ecause the Fees are collected merely to offset the costs of necessary state regulation, and not to raise revenue, they are not taxes under state or federal law"; such "fees" assertedly are subject to a more lenient Commerce Clause anti-discrimination standard. N.H. Mem. of Law at 13. The trial court rejected that position, concluding that the user fee must pass muster under the anti-discrimination rules this Court applied to "taxes" in *Scheiner*. *American Trucking Associations, Inc.* v. *New Hampshire*, No. 92-E-00604-B (N.H. Super. Ct. Apr. 19, 1993) (denying motion to dismiss).

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[2] The court found that the fee also was invalid on the ground that it did not approximate the benefits received by the interstate truckers.

[3] New Hampshire levies a $200 per company annual application fee and a $100 per vehicle unit fee (the tractor-trailers that carry goods interstate are classified as two units and would therefore be assessed a $200 per truck fee).

The State is continuing to press the argument in its interlocutory appeal.

If the Oregon decision is permitted to stand, States will seize upon it in support of efforts—like those already attempted by Massachusetts and New Hampshire—to exempt discriminatory user fees from scrutiny under the Commerce Clause. And there is no reason to suppose that those efforts will be restricted to waste disposal fees or highway fees. They would likely extend to user fees in every area of the economy.

That will produce confusion in the lower courts regarding the proper legal standard for assessing the constitutionality of such fees under the Commerce Clause—whether the "manifestly disproportionate to services rendered" test is the only one that user fees must satisfy or whether such fees must also pass muster under the anti-discrimination principle applicable to other types of mandatory payments to the States. In addition, state legislators considering how to structure user fees will be uncertain regarding the constitutional limits on their authority. There simply is no reason to allow such uncertainty to fester. This Court should act now to make clear that the Oregon court fundamentally erred in exempting user fees from the Commerce Clause's anti-discrimination principle.

B. User Fees That Discriminate Against Interstate Commerce Violate The Commerce Clause.

The petition amply demonstrates that the Oregon court's truncated constitutional standard is wholly inconsistent with this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *American Trucking Associations, Inc.* v. *Scheiner, supra.* See Pet. 13-14. The Court has made clear that user fees must be *both* nondiscriminatory *and* fairly related to the costs incurred by the State. *Delta Airlines*, 405 U.S. at 716-717; *Scheiner*, 483 U.S. at 289-290.

Indeed, this Court over 100 years ago rejected the very argument adopted by the Oregon Supreme Court in the present case. At issue in *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880), was a city ordinance that imposed wharfage fees for the landing on public wharves of non-Maryland merchandise; Maryland goods were exempt from the fees. The city argued that "those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property." 100 U.S. at 441. Declaring that proposition "unsound both upon principle and authority," this Court held that the fees violated the Commerce Clause because they imposed a discriminatory burden on interstate commerce. *Id.* at 442-443.

Any other rule would be completely unworkable. States would have a tremendous incentive to characterize as many exactions as possible as "user fees" in order to avoid the prohibition against discriminatory measures. Such a loophole in the protections conferred by the Commerce Clause, in turn, would leave reviewing courts in a quandary. Some would uphold levies bearing even the most tangential relationship to the State's costs; others might require a somewhat closer relationship between the amount of the fee and the costs to the State. In any event, considerable litigation—and much variation in approach—would certainly result.

The "very purpose" of the Commerce Clause was to establish "an area of free trade" among the States by forbidding discriminatory treatment of each other's products and trade. *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); *see also Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979). The Oregon Supreme Court's decision is squarely inconsistent with the core Commerce Clause principle that discrimination against interstate commerce cannot be tolerated. That decision should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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